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eBay Inc. and Microsoft Corporation

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

eBay Inc. and Microsoft Corporation,)	No. 4:10-cv-4947-CW (filed Nov. 2, 2010)
)	
<i>Plaintiffs and Counterclaim-Defendants,</i>)	EBAY AND MICROSOFT'S MOTION TO
)	REVIEW THE CLERK'S FAILURE TO
vs.)	TAX CERTAIN COSTS
)	
Kelora Systems, LLC,)	[Fed. R. Civ. P. 54(d)(1)]
)	
<i>Defendant and Counterclaim-Plaintiff.</i>)	Hr'g Date: Thursday, Sept. 20, 2012
)	Hr'g Time: 2:00 p.m.
)	Place: Courtroom 2, 4th Floor

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Bills of Costs submitted by eBay and Microsoft each properly included \$3,823.00 for the
4 cost of videotaping eight depositions taken in this action, for a total cost of \$7,646.00. *See* Chandler
5 Decl. ¶ 7 & Ex. D-1 (June 6, 2012) [ECF No. 161]. When the clerk taxed costs, however, the clerk
6 did not allow any costs for videotaping depositions. *See* Exs. A–B. The Federal Circuit has
7 specifically held that the cost of videotaping depositions is recoverable, and thus eBay and Microsoft
8 should be awarded these costs. *See In re Ricoh Co., Ltd. Patent Litigation*, 661 F.3d 1361, 1370
9 (Fed. Cir. 2011) (holding that N.D. Cal. Civil L.R. 54-3(c)(1) and 28 U.S.C. § 1920 allow recovery
10 of costs for videotaping depositions).

11 **II. ISSUES TO BE DECIDED**

12 This motion presents the following issue for the Court to decide:

- 13 • Are the costs for videotaping depositions recoverable under Civil L.R. 54-3(c)(1)?
14 (Yes.)

15 **III. FACTS**

16 When judgment was entered in favor of eBay and Microsoft, that judgment included an
17 award of costs. *See* Amended Judgment (June 5, 2012) [ECF No. 158]. eBay and Microsoft each
18 submitted a Bill of Costs and supporting declaration. *See* ECF Nos. 159–61 (June 6, 2012). With
19 respect to “Fees for printed or electronically recorded transcripts necessarily obtained for use in the
20 case,” eBay and Microsoft claimed the following:

	<u>eBay</u>	<u>Microsoft</u>
Transcripts of court hearings:	\$ 344.15 ¹	\$ 344.15 ²
Videotaping depositions:	\$ 3,823.00 ³	\$ 3,823.00 ⁴
Transcripts of depositions:	\$17,430.98 ⁵	\$ 12,275.98 ⁶
<u>Total claimed:</u>	\$ 21,598.13	\$ 16,443.13

See ECF Nos. 159–60 (June 6, 2012).

When the clerk taxed costs, however, the clerk disallowed some costs for “Fees for printed or electronically recorded transcripts necessarily obtained for use in the case.” The clerk disallowed \$5,393.22 of the costs claimed by eBay, and \$6,466.47 of the costs claimed by Microsoft. See Exs. A–B. The clerk gave the following explanation: “PRINTED TRANCRIPS [sic] ALLOWED CIVIL LR 54-3(c)(1); HEARINGS DISALLOWED CIVIL LR 54-3(b)(2).” *Id.* The deputy clerk did not show her math, but given the clerk’s explanation, it appears that the clerk disallowed the following amounts:

¹ See Chandler Decl. ¶¶ 4, 6 & Exs. A, C (June 6, 2012) [ECF No. 161].

² See *id.*

³ The total cost for videotaping eight depositions was \$7,646.00, which was split evenly between eBay and Microsoft. See Chandler Decl. ¶¶ 4, 7 & Exs. A, D-1 (June 6, 2012) [ECF No. 161].

⁴ See *id.*

⁵ eBay and Microsoft shared the costs for some deposition transcripts. eBay’s share of these costs was ½ of \$13,311.05 = \$6,655.53. See Chandler Decl. ¶ 7 & Ex. D-1 (June 6, 2012) [ECF No. 161]. In addition, eBay paid the full amount for some deposition transcripts. eBay paid \$10,775.45 for these deposition transcripts. See Chandler Decl. ¶ 7 & Ex. D-2 (June 6, 2012) [ECF No. 161]. Thus the total amount that eBay paid for deposition transcripts was \$6,655.53 + \$10,775.45 = \$17,430.98.

⁶ eBay and Microsoft shared the costs for some deposition transcripts. Microsoft’s share of these costs was ½ of \$13,311.05 = \$6,655.53. See Chandler Decl. ¶ 7 & Ex. D-1 (June 6, 2012) [ECF No. 161]. In addition, Microsoft paid the full amount for some deposition transcripts. Microsoft paid \$5,620.45 for these deposition transcripts. See Chandler Decl. ¶ 7 & Ex. D-3 (June 6, 2012) [ECF No. 161]. Thus the total amount that Microsoft paid for deposition transcripts was \$6,655.53 + \$5,620.45 = \$12,275.98.

	<u>eBay</u>	<u>Microsoft</u>
Transcripts of court hearings:	\$ 344.15	\$ 344.15
Videotaping depositions:	\$ 3,823.00	\$ 3,823.00
Rough transcripts of depositions, ASCII files, etc.:	\$ 1,226.07	\$ 2,299.32
<u>Total disallowed:</u>	\$ 5,393.22	\$ 6,466.47

For purposes of this action only, eBay and Microsoft will not contest the clerk's disallowance of the costs for the transcripts of court hearings or for the rough transcripts of depositions, etc. But eBay and Microsoft do contest the clerk's disallowance of the costs of videotaping depositions.

IV. ARGUMENT

The local rules state that "[t]he cost of an original and one copy of any deposition (*including videotaped depositions*) taken for any purpose in connection with the case is allowable." Civil L.R. 54-3(c)(1) (emphasis added). The Federal Circuit recently affirmed Judge Ware's conclusion that "[a]llowing recovery for *both* [the costs associated with the written transcript of a deposition, as well as the costs associated with the videotape of the deposition] is more in accord with the language of the Local Rules [in the Northern District of California], along with commonplace practice in patent litigation of videotaping deponents." *In re Ricoh Co., Ltd. Patent Litigation*, 661 F.3d 1361, 1370 (Fed. Cir. 2011) (emphasis added). Thus, the Federal Circuit concluded that "the district court did not exceed its authority under section 1920 in taxing both the written transcription and the video of the depositions." *Id.*

Given the Federal Circuit's ruling in *Ricoh*, it is clear that the costs of videotaping depositions are recoverable under Civil L.R. 54-3(c)(1). Accordingly, the amounts awarded to eBay and Microsoft should each be increased by \$3,823.00 to account for the clerk's failure to tax these costs.

V. CONCLUSION

For all of these reasons, eBay and Microsoft's motion to review the clerk's failure to tax certain costs should be GRANTED as set forth in the Proposed Order.

1 Dated: July 27, 2012

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Defendant Microsoft Corporation*

EXHIBITS

Ex. A: Clerk's taxation of costs in favor of Microsoft, with \$6,466.47 in costs disallowed (July 20, 2012) [ECF No. 171]

Ex. B: Clerk's taxation of costs in favor of eBay, with \$5,393.22 in costs disallowed (July 20, 2012) [ECF No. 172]

Exhibit A

UNITED STATES DISTRICT COURT

for the

Northern District of California

eBay Inc. and Microsoft Corporation

v.

Kelora Systems, LLC

Case No.: 4:10-cv-04947-CW

AMENDED
BILL OF COSTS

Judgment having been entered in the above entitled action on 06/05/2012 against Kelora Systems, LLC,
Date
 the Clerk is requested to tax the following as costs:

Fees of the Clerk	\$ 1,350.00
Fees for service of summons and subpoena	491.61
Fees for printed or electronically recorded transcripts necessarily obtained for use in the case	\$9,976.66 —16,443.13
PRINTED TRANSCRIPTS ALLOWED CIVIL LR54-3(c)(1); HEARINGS DISALLOWED CIVIL LR	
Fees and disbursements for printing	54-3(b)(2)
Fees for witnesses (<i>itemize on page two</i>)	1,058.27
Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case.	18,077.73
Docket fees under 28 U.S.C. 1923	
Costs as shown on Mandate of Court of Appeals	
Compensation of court-appointed experts	
Compensation of interpreters and costs of special interpretation services under 28 U.S.C. 1828	
Other costs (<i>please itemize</i>)	
TOTAL	\$ —37,420.74
	\$30,954.27

SPECIAL NOTE: Attach to your bill an itemization and documentation for requested costs in all categories.

Declaration

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this bill has been served on all parties in the following manner:



Electronic service



First class mail, postage prepaid



Other: _____

s/ Attorney: /s/ Theodore W. ChandlerName of Attorney: Theodore W. Chandler

For: Microsoft Corporation
Name of Claiming Party

Date: 06/06/2012

Taxation of Costs

Costs are taxed in the amount of \$30,954.27 and included in the judgment.

RICHARD W. WIEKING
Clerk of Court

By: Lisa R. Glod*Deputy Clerk*

7/20/12
Date

Exhibit B

UNITED STATES DISTRICT COURT

for the

Northern District of California

eBay Inc. and Microsoft Corporation)

v.)

Kelora Systems, LLC)

Case No.: 4:10-cv-04947-CW)

BILL OF COSTS

Judgment having been entered in the above entitled action on 06/05/2012 against Kelora Systems, LLC,
Date

the Clerk is requested to tax the following as costs:

Fees of the Clerk	\$ 1,350.00
Fees for service of summons and subpoena	491.61
Fees for printed or electronically recorded transcripts necessarily obtained for use in the case	\$16,204.91 21,598.13
PRINTED TRANSCRIPTS ALLOWED CIVIL LR 54-3(c)(1); HEARINGS DISALLOWED CIVIL	194.00
Fees and disbursements for printing	LR 54-3(b)(2) ..
Fees for witnesses (itemize on page two)	1,058.27
Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case.	162,466.25
Docket fees under 28 U.S.C. 1923	
Costs as shown on Mandate of Court of Appeals	
Compensation of court-appointed experts	
Compensation of interpreters and costs of special interpretation services under 28 U.S.C. 1828	
Other costs (please itemize)	
TOTAL	\$ 187,158.26 \$181,765.04

SPECIAL NOTE: Attach to your bill an itemization and documentation for requested costs in all categories.

Declaration

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this bill has been served on all parties in the following manner:



Electronic service



First class mail, postage prepaid



Other: _____

s/ Attorney: /s/ Theodore W. ChandlerName of Attorney: Theodore W. ChandlerFor: eBay Inc.
Name of Claiming PartyDate: 06/06/2012

Taxation of Costs

Costs are taxed in the amount of \$181,765.04 and included in the judgment.RICHARD W. WIEKING
Clerk of CourtBy: Lisa R. Clark

Deputy Clerk

7/20/12
Date